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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 590

JAMES UTLEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 284–288) is not yet reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered October 25, 1940 (R. 289). The petition for a writ of certiorari was filed November 22, 1940. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rule XI of the Criminal Appeals Rules promulgated by this Court on May 7, 1934.

QUESTIONS PRESENTED

1. Whether in the absence of objection or exception properly saving the question for appellate review, the Circuit Court of Appeals erred in declining to consider whether, under the circumstances of this case, the divulgence of the contents of certain telephone conversations by a witness not a party thereto was prohibited by Section 605 of the Communications Act of 1934.

2. Whether the Circuit Court of Appeals erred in failing to pass on the sufficiency of the indictment when petitioner did not except to the ruling of the trial court, did not specify it as error, and did not brief or argue it on appeal.

3. Whether the Circuit Court of Appeals erred in failing to consider whether the trial court imposed double punishment in sentencing petitioner on both counts of the indictment.

4. Whether the trial court should have declared a mistrial, because of alleged misconduct of the prosecutor.

STATUTES INVOLVED

The pertinent statutory provisions are set forth in the Appendix, *infra,* pp. 13–14.

STATEMENT

On September 20, 1939, an indictment in two counts was returned against the petitioner in the District Court for the Southern District of California (R. 1–3). The first count charged peti-

tioner with purchasing, selling, dispensing, and distributing 200 grains of smoking opium which was not in or from the original stamped package containing such opium, in violation of Section 2553 (a) of the Internal Revenue Code, 26 U. S. C., § 2553 (a) (Appendix, *infra*, p. 14). The second count charged petitioner with knowingly and fraudulently receiving, concealing, buying, selling, and facilitating the transportation and concealment after importation of 200 grains of smoking opium, knowing the same to have been imported contrary to law, in violation of U. S. C., Title 21, Sec. 724 (Appendix, *infra*, p. 15).

The petitioner's demurrer to the indictment, made on the grounds that neither count stated an offense or sufficiently informed petitioner of the nature of the charge (R. 4–5), was overruled (R. 7). Petitioner was tried and convicted under both counts (R. 12–13), and was sentenced to imprisonment for one year, eleven months, and thirteen days on the first count and five years on the second count. Execution of sentence on count two was suspended and petitioner was placed on probation for a period of five years from the date of his release under the sentence imposed on count one (R. 28). On appeal, the judgment of conviction was unanimously affirmed by the Circuit Court of Appeals for the Ninth Circuit (R. 284–289).

The evidence shows that on January 23, 1937, two Los Angeles police officers entered an apart-

ment occupied by two women, Betty Angel and Marian O'Neill. While the officers were in the apartment, Betty Angel had two telephone conversations with defendant in which arrangement was made for the delivery of the narcotics which were the subject of this indictment. Officer Clarke overhead these telephone conversations by placing his ear close to the receiver (R. 57, 60–61). Thereafter, defendant arrived with the narcotics and was arrested by the two officers (R. 71–74). The testimony of these two officers and subsequent statements of defendant in the nature of admissions (R. 74, 156, 160) resulted in the defendant's conviction.

Officer Clarke testified to the substance of these conversations which was to the effect that defendant would supply Betty Angel with a 50-fung jar of "black stuff" for $22.50, and she was to have the money ready when he arrived (R. 58, 60, 61, 62). Defendant's counsel objected to certain portions of this testimony on the grounds that no sufficient foundation had been laid to connect defendant with the voice at the other end of the telephone, that certain questions called for opinion testimony, and that other questions were leading (R. 50, 53, 56, 57, 58, 59). At no time did he suggest that the evidence was inadmissible, if proper foundation were laid. No objection was made on the grounds that the testimony was inadmissible as a violation of the Communications Act nor was any exception

taken to any ruling of the court. No assignment of error challenged the admissibility of the testimony on these grounds (Assignments 6, 7, 12, 26, 27, 28).

In the course of the trial, counsel for the Government elicited testimony tending to show that defendant had attempted to bribe the police officers (R. 83). Defendant objected that this was prejudicial, but upon an offer of the court to declare a mistrial, he withdrew the objection and the court admonished the jury to disregard the testimony (R. 87–88).

The trial court charged the jury that they might find the defendant guilty on both counts of the indictment if they found that he distributed or possessed the narcotics in question in or from unstamped packages unless he satisfactorily explained his possession or distribution (R. 215, 219–220). At the conclusion of the instructions defendant's counsel said: "The defendant is satisfied with the Court's instructions" (R. 225).

ARGUMENT

I

Petitioner asks this Court to grant a writ of certiorari on the grounds that evidence was admitted contrary to Section 605 of the Communications Act of 1934, 47 U. S. C., Sec. 605 [1] (Pet. 4, Br. 5). In the first place, it is clear that the question is not one proper for review because no objection or exception was taken in the trial court to the admission

[1] Appendix, *infra*, p. 15.

of the testimony, no assignment of error was taken to the Circuit Court of Appeals, and that court did not pass on it. In this state of the record, the substantive problem of admissibility of this evidence is not properly here for review. *Wood* v. *A. Wilbert's Sons Shingle & Lumber Co.*, 226 U. S. 384; *Edward Hines Yellow Pine Trustees* v. *Martin*, 268 U. S. 458, 465; *Canal & C. Streets R. Co.* v. *Hart*, 114 U. S. 654, 663; *Southern Pine Lumber Co.* v. *Ward*, 208 U. S. 126, 143; *United States* v. *Atkinson*, 297 U. S. 157; *McBride* v. *United States*, 284 Fed. 416, 419 (C. C. A. 5th), cert. denied, 261 U. S. 614.

Secondly, the evidence was properly admitted. *Nardone* v. *United States*, 302 U. S. 379; *Nardone* v. *United States*, 308 U. S. 338; and *Weiss* v. *United States*, 308 U. S. 321, have no application. We are not here confronted with any problem of "wire tapping." Officer Clarke simply overheard what was said by each of the parties to telephone conversations. There was no "interception" of any kind. It seems perfectly clear that the mere overhearing of a telephone conversation was never intended by Congress to constitute an "interception" within the meaning of Section 605. Although there is language in *United States* v. *Polakoff*, 112 F. (2d) 888 (C. C. A. 2d), certiorari denied, October 14, 1940, No. 295, present term, which supports petitioner's contention, that case involved the interception of a telephone conversation by means of a recording device connected with a telephone

extension. It is also made clear in the opinion in that case that the introduction of the telephone conversation was highly damaging to the defendant and, if inadmissible, was so prejudicial as to warrant reversal.

Thirdly, the recital of what petitioner said over the telephone was in no way essential to the Government's case. The essential facts which led to conviction were the delivery (R. 71–72, 74–75) of the smoking opium (R. 47–49) and the acceptance of money therefor (R. 74, 76–78, 107–108, 110, 126). These facts were testified to by the police officers of their own knowledge and this testimony, apart from the evidence of the telephone conversations, was abundantly sufficient to warrant a conviction. Since Betty Angel, a party to the conversations, was cooperating with the police it is plain that officers Clarke and Duede were not dependent on the alleged "interception" for their information of the pending delivery and would have been present when defendant delivered the opium whether officer Clarke had overheard the conversations or not.

Fourthly, petitioner asserts that the Circuit Court of Appeals should have disregarded the lack of objection and exception and specification of error and considered the merits of petitioner's contention. It is, of course, true that an appellate court may, in its discretion, consider obvious errors committed by a lower court where failure so to do would result in a gross miscarriage of justice, or

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"seriously affect the fairness, integrity or public reputation of judicial proceedings." *United States* v. *Atkinson,* 297 U. S. 157, 160. In view of the fact that the evidence was neither essential to the prosecution nor prejudicial to the defendant, the error in admitting it, if error there was, could not result in a miscarriage of justice. Consequently, the refusal of the court to discuss the question was not an abuse of discretion (*United States* v. *Reed,* 96 F. (2d) 785 (C. C. A. 2d), cert. den. 305 U. S. 612), and is not subject to review in this Court.

II

Petitioner next contends that the indictment did not sufficiently inform him of the nature and cause of the accusation against him. His demurrer to the indictment was overruled in the trial court. Petitioner did not specify this ruling as error in the Circuit Court of Appeals, nor did he argue the question either in his brief or orally in that court which, for that reason deemed the point to have been waived (R. 285). That decision was correct. *Schnitzer* v. *United States,* 77 F. (2d) 233 (C. C. A. 8th); *Callahan* v. *United States,* 53 F. (2d) 467 (C. C. A. 3d), aff'd 285 U. S. 515; *Rettich* v. *United States,* 84 F. (2d) 118 (C. C. A. 1st).

In any event, the indictment was sufficient (*Husty* v. *United States,* 282 U. S. 694), and the conviction would have to be sustained. Each count of the indictment charged an offense sub-

stantially in the terms of the respective statutes. Cf. *Debs* v. *United States,* 249 U. S. 211. It is not contended that the indictment failed to charge offenses, but rather that it failed to specify with particularity the circumstances of the offenses. The defendant filed no motion in the trial court for a bill of particulars, and there is not the slightest indication in the record that he was taken by surprise or was in doubt as to the offense charged. He is unable to show any prejudice whatsoever or that he was deprived of any substantial right. *Berger* v. *United States,* 295 U. S. 79, 81, 82; *Myers* v. *United States,* 15 F. (2d) 977, 985 (C. C. A. 8th); *Perez* v. *United States,* 10 F. (2d) 352, 353 (C. C. A. 9th); *United States* v. *Polakoff,* 112 F. (2d) 888, 890 (C. C. A. 2d), certiorari denied, October 14, 1940, No. 295, present term. The degree of particularity needed in a criminal indictment is necessarily a matter to be decided on the facts and circumstances of each case. As petitioner points out in his petition (Pet. 5) it appears that the Circuit Court of Appeals for the Eighth Circuit is more strict than the Circuit Court of Appeals for the Ninth Circuit. In the Eighth Circuit extreme particularity is required in the indictment. In the Ninth Circuit any doubt which an accused may have as to the circumstances of the offense may be readily remedied by a bill of particulars. The result in each case is to protect an accused from surprise or prejudice arising from the incompleteness of the charge against him. This

Court has hitherto refused to reconcile these alternative means to secure the same end, in cases where the petitioners had adequately presented the point. *Davis* v. *United States,* 49 F. (2d) 267, 269 (C. C. A. 4th), certiorari denied, 283 U. S. 859; *Wilson* v. *United States,* 59 F. (2d) 1 (C. C. A. 5th), certiorari denied, 287 U. S. 623; *United States* v. *Busch,* 64 F. (2d) 27 (C. C. A. 2d), certiorari denied, 290 U. S. 627.

III

Petitioner contends that double punishment was inflicted in this case and cites a conflict of decision with *Copperthwaite* v. *United States,* 37 F. (2d) 846 (C. C. A. 6th) and *Ballerini* v. *Aderholt,* 44 F. (2d) 352 (C. C. A. 5th) (Pet. 6). The court below expressly refused to consider the question since the assignment of error was unintelligible, too general, and not in compliance with its rules (R. 288). But had it decided this issue adversely to the petitioner, such decision would have been clearly correct. The test established in *Blockburger* v. *United States,* 284 U. S. 299, 304, for determining whether there are two offenses or only one is whether each provision requires proof of a fact which the other does not. Under the Harrison Narcotic Act there must be proof that the purchase, sale, or distribution was not in or from the original stamped package (Appendix, infra, p. 13). Under the Narcotic Drugs Import and Export Act, there must be proof that the purchase, concealment, sale, or facilitation of

transportation be of a narcotic drug which has been imported contrary to law and that it was known by the offender to have been so illegally imported. (Appendix, infra, p. 14.) Obviously these are quite separate elements and their concurrence in one transaction results in the commission of two offenses. This point is foreclosed by the *Blockburger* case which expressly resolved the conflict which petitioner now asserts adversely to petitioner's present contention.[2]

IV

1. Petitioner's fourth contention is that the trial court erred in not declaring a mistrial after petitioner's counsel requested the court not to declare a mistrial but rather to admonish the jury and strike from the record the objectionable testimony. In the first place, petitioner should not be heard to

[2] *Ballerini* v. *Aderholt* was specifically disapproved. The reasoning of the dictum in the *Copperthwaite* case, which was brought to the attention of the Court in the *Blockburger* case (No. 374, October Term, 1931, Br. for the United States, p. 11), is inconsistent with the holding in the *Blockburger* decision. Cases since 1931 have consistently held that the statutes create distinct offenses so that consecutive sentences do not amount to double punishment. *Silverman* v. *United States*, 59 F. (2d) 636, 637 338 (C. C. A. 1st), certiorari denied, 287 U. S. 640; *Yep* v. *United States*, 81 F. (2d) 637, 638 (C. C. A. 10th), reversed on other grounds, 83 F. (2d) 41; *Mullaney* v. *United States*, 82 F. (2d) 638, 644 (C. C. A. 9th); *Jindra* v. *United States*, 69 F. (2d) 429, 430 (C. C. A. 5th), certiorari denied, 292 U. S. 651; *Corollo* v. *Dutton*, 63 F. (2d) 7, 8 (C. C. A. 5th).

complain of any error in this action as he brought it upon himself. (See opinion of the court below. R. 287). In the second place, the admonition of the trial judge to the jury to disregard the objectionable testimony completely cured the error. (*Gilmore* v. *United States,* 268 Fed. 719 (C. C. A. 5th), certiorari denied, 255 U. S. 576; *Spivey* v. *United States,* 109 F. (2d) 181 (C. C. A. 5th), certiorari denied, 310 U. S. 631; *Landay* v. *United States,* 108 F. (2d) 698 (C. C. A. 6th), certiorari denied, 309 U. S. 681.)

2. Petitioner in his brief in support of his petition for certiorari (Br. 13, 14) complains of prejudicial misconduct on the part of the District Attorney in his address to the jury. Since this was not included in the reasons advanced in the petition (Pet. 4–6), petitioner is not entitled to raise it. *General Pictures Co.* v. *Electric Co.,* 304 U. S. 175, 177–178. But if he were, since no exception was taken in the trial court and since the Circuit Court of Appeals for that reason did not pass on this issue, it is not subject to review. Were it subject to review, we submit that it was in all respects proper and any comments outside the record were directly invited by petitioner's counsel and were not prejudicial. *United States* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150, 237, 238, 239; *United States* v. *German,* 115 Fed. 987, 989–990 (W. D. Ky.).

CONCLUSION

The petition for writ of certiorari presents no questions of importance nor substantial conflict of decision and we respectfully submit that it should be denied.

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DECEMBER 1940.